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Lim Guan Eng v New Straits Times Press (M) Bhd

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HIGH COURT (PENANG) — CIVIL SUIT NO PA-23NCvC-2–03 OF 2016
ROSILAH YOP J
13 JANUARY 2017

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Tort — Damages — Defamation — Plaintiff sued defendant for defamation based on news article released by defendant — Whether defendant could rely on publication of erratum in mitigation of damages — Whether plaintiff entitled to be awarded injunctive relief and general damages

D

Tort — Defamation — Impugned statements — Plaintiff sued defendant for defamation based on news article released by defendant — Whether impugned statements defamatory of plaintiff — Whether impugned statements referred to plaintiff — Whether impugned statements were published to third parties — Whether defendant could rely on defence of qualified privilege, defence under s 12 of the Defamation Act 1957 and defence of reportage — Whether defendant practiced responsible journalism according to Reynolds privilege — Defamation Act 1957 s 12

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The plaintiff instituted an action for defamation against Dato' Dr Shaik Hussein Mydin, who was the Chief of the UMNO Youth Wing in Penang. However, on the trial date, they had resolved their dispute and recorded consent judgment ('the consent judgment'). A journalist under the employment of the defendant for the *Berita Harian* daily was present during the proceedings and was given a draft copy of the consent judgment. On 20 August 2015, the defendant printed and published in its *Berita Harian* newspaper in respect of the proceedings, under the caption 'Guan Eng Tarik balik saman terhadap bekas Ketua Pemuda UMNO Negeri'. In gist, it was stated in the news article that the plaintiff had discontinued the civil suit which he had instituted against Dato' Dr Shaikh Hussein Mydin who defamed and disparaged him in his office, position and profession; and that the discontinuance was made unconditionally on the first day of the trial ('the impugned statements'). The plaintiff contended that the impugned statements did not constitute a fair and accurate report of the judicial proceedings in the High Court and were defamatory of him, hence the present action. The issues surrounding the dispute were: (a) whether the impugned statements were defamatory of the plaintiff; (b) whether the impugned statements referred to the plaintiff; (c) whether the impugned statements were published to the third parties; (d) whether the defendant could rely on defence of qualified privilege,

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defence under s 12 of the Defamation Act 1957 ('the Act') and defence of reportage; (e) whether the defendant had practiced responsible journalism according to the *Reynolds* privilege; (f) whether the defendant could rely on the publication of the erratum in mitigation of damages; and (g) whether the plaintiff was entitled to be awarded injunctive relief and general damages.

Held, allowing the plaintiff's action with costs of RM35,000:

(1) Based on the evidence, the impugned statements did not constitute a fair and accurate report of the judicial proceeding and were untrue and deceptive, as facts had been distorted to the extent of reducing the article to false news. In such situation, malice on the part of the defendant could be inferred. Further, the reasonable minded person would comprehend the entire situation negatively by unconditionally discontinuing the civil suit, the plaintiff had admitted to the serious accusation of bribery. The impugned statements were capable of bearing the connotations and/or imputations against the plaintiff, which leave district impression on the mind of the reasonable reader. The impugned statements undoubtedly possess the tendency to excite against the plaintiff, the adverse opinion of others, tends to lower the plaintiff in the estimation of the right thinking members of the society. As a whole, the content of the said news article was defamatory to the plaintiff (see paras 43–48 & 79–81).

(2) There was no dispute that the content of the news article containing the impugned statements clearly stated the plaintiff's name, hence, the impugned statements referred to the plaintiff. Further, the defendant in his defence admitted the said news article containing the impugned statements was published in its *Berita Harian* daily. The impugned statements were therefore published to the third parties (see paras 51–52 & 54–55).

(3) It was established beyond reasonable doubt that the news article containing the impugned statements was not a fair and accurate report of events that took place in open court on 19 August 2015. The defendant did not dispute that the news article which contained the impugned statements was misleading and deceptive on account of its failure to print and publish the exact terms of the consent judgment. Therefore, the defendant had failed to satisfy the threshold requirement dictated by the principle governing the defence of qualified privilege on newspaper report on judicial proceeding and for the same reason the defence of reportage would be of no avail to the defence (see paras 63–65 & 74).

(4) Section 12(1) and (2) of the Act was not applicable in the present case because the publication complained of did not fall into any of the categories mentioned in Part I and Part II of the Schedule to the Act. Part I and Part II of the Schedule to the Act did not encompass court proceedings in Malaysia (see para 69).

(5) The erratum published was not the correction of the published text. The erratum published was wholly unsatisfactory and inadequate in all circumstances of the matter. The defendant should have known that such news article which contained the impugned statements published in a nationally read newspaper would have serious implication on the plaintiff. Hence, the publication of the erratum by the defendant was incapable of mitigating the damages. In totality, the plaintiff had succeeded in proving on balance of probabilities that he was defamed by the defendant (see paras 90–93).

(6) It could not be disputed that the plaintiff had high social standing. The libelous allegation of accepting bribes was of grave and serious nature which had tendency to damage the plaintiff's reputation as Chief Minister. In addition, *Berita Harian* daily had wide circulation in Peninsular Malaysia and the publication was extensive. Based on the facts, the court awarded RM300,000 as general and aggravated damages with 5% interest from the date of judgment until realisation. The court dismissed the claim for exemplary damages as it did not come within the principles set out in the case of *Rookes v Barnard & Ors* [1964] AC 1129. The prayer for injunction and apology were not allowed by the court as the court found that general damages would suffice (see paras 97–104).

[Bahasa Malaysia summary

Plaintif memulakan tindakan untuk fitnah terhadap Dato' Dr Shaik Hussein Mydin, yang mana adalah Ketua Sayap Pemuda UMNO di Pulau Pinang. Walau bagaimanapun, pada tarikh perbicaraan, mereka telah menyelesaikan pertikaian mereka dan merekodkan penghakiman izin ('penghakiman izin'). Seorang wartawan yang mana adalah pekerja defendan bagi *Berita Harian* hadir semasa prosiding tersebut dan diberikan salinan draf penghakiman izin tersebut. Pada 20 Ogos 2015, defendan mencetak dan menerbitkan dalam surat khabar *Berita Harian* berkaitan prosiding tersebut, di bawah kapsyen 'Guan Eng Tarik balik saman terhadap bekas Ketua Pemuda UMNO Negeri'. Ringkasnya, ia dinyatakan di dalam artikel berita bahawa plaintif telah tidak meneruskan tindakan sivil tersebut yang mana dia telah mulakan terhadap Dato' Dr Shaikh Hussein Mydin orang yang memfitnah dan memperkecilkan dia di dalam pejabatnya, kedudukan dan profesionnya; dan bahawa pemberhentian tersebut dibuat tanpa syarat pada hari pertama perbicaraan tersebut ('pernyataan yang dipersoalkan'). Plaintif berhujah bahawa pernyataan yang dipersoalkan tersebut tidak membentuk laporan yang adil dan tepat terhadap prosiding kehakiman di Mahkamah Tinggi dan adalah fitnah terhadapnya, maka tindakan ini. Isu-isu melingkungi pertikaian adalah: (a) sama ada pernyataan yang dipersoalkan tersebut adalah fitnah terhadap plaintif; (b) sama ada pernyataan yang dipersoalkan tersebut merujuk kepada plaintif; (c) sama ada pernyataan yang dipersoalkan tersebut diterbitkan kepada pihak ketiga; (d) sama ada defendan boleh bergantung ke atas

pembelaan perlindungan bersyarat, pembelaan di bawah s 12 Akta Fitnah 1957 ('Akta') dan pembelaan pelaporan; (e) sama ada defendan telah mengamalkan tanggungjawab kewartawanan mengikut perlindungan *Reynolds*; (f) sama ada defendan boleh bergantung ke atas penerbitan ralat tersebut dalam mitigasi ganti rugi; dan (g) sama ada plaintif berhak untuk diawardkan dengan relief injunktif dan ganti rugi.

Diputuskan, membenarkan tindakan plaintif dengan kos sebanyak RM35,000:

(1) Berdasarkan keterangan, pernyataan yang dipersoalkan tersebut tidak membentuk laporan yang adil dan tepat terhadap prosiding kehakiman tersebut dan adalaah tidak benar dan mengelirukan, kerana fakta telah diputarbelitkan sehingga menjadikan artikel tersebut kepada berita palsu. Dalam keadaan sebegini, kebencian oleh pihak defendan boleh diputuskan. Selanjutnya, orang yang munasabah akan memahami keseluruhan keadaan secara negatif dengan tanpa syarat menghentikan tindakan sivil tersebut, plaintif telah mengakui kepada tuduhan serius rasuah tersebut. Pernyataan yang dipersoalkan tersebut mempunyai konotasi dan/atau tuduhan terhadap plaintif, yang meninggalkan kesan kuat kepada fikiran pembaca yang munasabah. Pernyataan yang dipersoalkan tersebut tidak syak lagi mempunyai kecenderungan untuk meransang terhadap plaintif, pendapat buruk orang lain, cenderung untuk melemahkan plaintif pada anggaran pemikiran betul masyarkat. Secara keseluruhannya, isi kandungan artikel berita tersebut adalah fitnah terhadap plaintif (lihat perenggan 43–48 & 79–81).

(2) Tidak terdapat pertikaian bahawa isi kandungan artikel berita tersebut mengandungi pernyataan yang dipersoalkan tersebut jelas menyatakan nama plaintif, maka, pernyataan yang dipersoalkan tersebut merujuk kepada plaintif. Selanjutnya, defendan dalam pembelaannya mengakui yang artikel berita tersebut mengandungi pernyataan yang dipersoalkan tersebut diterbitkan di dalam suratkhabarnya *Berita Harian*. Pernyataan yang dipersoalkan tersebut oleh itu diterbitkan kepada pihak ketiga (lihat perenggan 51–52 & 54–55).

(3) Ia telah dibuktikan melampaui keraguan munasabah bahawa artikel berita yang mempunyai pernyataan yang dipersoalkan tersebut bukan laporan adil dan tepat kejadian yang terjadi di mahkamah terbuka pada 19 Ogos 2015. Defendan tidak mempertikaikan bahawa artikel berita tersebut yang mengandungi pernyataan yang dipersoalkan tersebut adalah mengelirukan dan menipu atas kegagalannya untuk mencetak dan menerbitkan terma tepat penghakiman izin tersebut. Oleh itu, defendan telah gagal untuk memenuhi ambang keperluan yang ditentukan oleh prinsip yang mengawal pembelaan perlindungan bersyarat mengenai laporan suratkhabar atas prosiding kehakiman dan

untuk alasan yang sama pembelaan pelaporan tidak dapat digunakan kepada pembelaan (lihat perenggan 63–65 & 74).

(4) Seksyen 12(1) dan (2) Akta tidak beraplikasi dalam kes ini kerana penerbitan yang diadukaan tidak terangkum dalam mana-mana kategori yang dinyatakan di dalam Bahagian I dan Bahagian II Jadual kepada Akta. Bahagian I dan Bahagian II Jadual kepada Akta tidak merangkumi prosiding mahkamah di Malaysia (lihat perenggan 69).

(5) Ralat yang diterbitkan bukan pembetulan terhadap teks yag diterbitkan. Ralat yang diterbitka keseluruhannya tidak memuaskan dan tidak mencukupi dalam kesemua keadaan perkara tersebut. Defendan sepatutnya tahu bahawa artikel berita sedemikian yang mempunyai pernyataan yang dipersoalkan tersebut diterbitkan di dalam suratkhabar yang dibaca secara nasional akan mempunyai implikasi yang serius ke atas plaintif. Maka, penerbitan ralat tersebut oleh defendan tidak berupaya untuk mengurangkan ganti rugi tersebut. Secara keseluruhan, plaintif telah berjaya dalam membuktikan atas imbangan kebarangkalian yang dia telah difitnah oleh defendan (lihat perenggan 90–93).

(6) Ia tidak dapat dipertikaikan bahawa plaintif mempunyai kedudukan sosial yang tinggi. Dakwaan fitnah menerima rasuah adalah bersifat serius dan mudarat yang mempunyai kecenderungan untuk merosakkan reputasi plaintif sebagai Ketua Menteri. Selanjutnya, suratkhabar *Berita Harian* mempunyai peredaran luas di Semenanjung Malaysia dan penerbitan adalah secara luas. Berdasarkan fakta, mahkamah mengawardkan sebanyak RM300,000 sebagai ganti rugi am dan teladan dengan faedah 5% dari tarikh penghakiman sehingga realisasi. Mahkamah menolak tuntutan untuk ganti rugi teladan kerana ia tidak termasuk dalam prinsip-prinsip yang ditetapkan dalam kes *Rookes v Barnard & Ors* [1964] AC 1129. Permohonan untuk injunksi dan memohon maaf tidak dibenarkan oleh mahkamah kerana mahkamah mendapati yang ganti rugi am akan mencukupi (lihat perenggan 97–104).]

Notes

For a case on impunged statements, see 12(1) *Mallal's Digest* (5th Ed, 2015) para 536.

For cases on defamation, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 240–268.

Cases referred to

Adam v Ward [1917] AC 309, HL (refd)
Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315, HC (refd)
Bonnick v Morris and others [2002] UKPC 31, PC (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)
DP Vijandran v Karpal Singh & Ors [2000] 3 MLJ 22, HC (refd)
Dato Annas bin Khatib Jaafar v Datuk Manja Ismail & Ors [2011] 8 MLJ 747, HC (refd)
Datuk Seri Anwar bin Ibrahim v Utusan Melayu (M) Bhd & Anor [2013] 3 MLJ 534, HC (refd)
Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd [1993] 1 MLJ 408, HC (refd)
Jameel and another v Wall Street Journal Europe SPRL [2006] 4 All ER 1279; [2006] UKHL 44, HL (refd)
Joceline Tan Poh Choo & Ors v V Muthusamy [2003] 4 MLJ 494; [2003] 5 AMR 195, CA (refd)
Lim Guan Eng v Utusan Melayu (M) Bhd [2012] 2 MLJ 394, HC (refd)
Reynolds v Times Newspapers Ltd and others [2001] 2 AC 127, HL (refd)
Rookes v Barnard & Ors [1964] AC 1129, HL (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173; [1988] 1 CLJ Rep 233, SC (refd)
Zaina Salleh bin Abdul Rahman v The New Straits Time (M) Bhd [2015] MLJU 738, CA (refd)

Legislation referred to

Defamation Act 1957 s 12, 12(1), (2), Schedule, Part I, Part II
Specific Relief Act 1950 s 53

Simon Murali (Simon Murali & Co) for the plaintiff.
Leong Wai Hong (Skrine) for the defendant.

Rosilah Yop J:

INTRODUCTION

[1] The plaintiff claims against the defendant for an order:

(a) pursuant to the jurisdictional powers of this honourable court under s 53 of the Specific Relief Act 1950 and under its inherent jurisdiction, a mandatory injunction be issued to compel the defendant to print and publish an unconditional apology to the plaintiff within seven days from the pronouncement of the judgment, wherein the apology must be published in a conspicuous section of the *Berita Harian* daily;

(b) the defendant be ordered to pay the plaintiff general damages, which includes aggravated damages and exemplary damages;

(c) the defendant be ordered to pay interest where the amount awarded as damages at the rate specified by this honourable court;

(d) the defendant be ordered to pay costs to the plaintiff; and

(e) and others reliefs and/or orders deemed appropriate, proper and just by this honourable court.

THE PLAINTIFF'S CASE

[2] The plaintiff was at all material times the Chief Minister of Pulau Pinang.

[3] The plaintiff also holds the position of Secretary General in the registered political organisation known as Democratic Action ('DAP').

[4] The defendant was at material times the printer, publisher and distributor of a Malay language daily known as *Berita Harian*. *Berita Harian* commands huge readership and subscription with extensive circulation in Peninsular Malaysia.

[5] On 13 December 2012, the plaintiff instituted a Civil Suit No 22NCvC-853–12 of 2012 in the High Court of Penang against Dato' Dr Shaik Hussein Mydin, who was then the Chief of the UMNO Youth Wing in Penang. The cause of action arose from a defamatory statement made by him against the plaintiff at a press conference on 5 January 2012.

[6] The case was scheduled for full trial on 19 August 2015 before the honorable judicial commissioner Dato' Nordin bin Hassan of High Court (5), Penang. However, on the trial date, the High Court was notified that the plaintiff and the said Dato' Dr Shaikh Hussein Mydin has amicably resolved the dispute and intended to record a consent judgment.

[7] The consent judgment was recorded and spelled out in precision and clarity the following terms:

(a) that Dato' Dr Shaikh Hussein Mydin shall unconditionally and unreservedly retract the defamatory statements he made against the plaintiff in a press conference convened on 5 October 2012, where the statements read:

(i) 'Dan saya berasakan dan saya tidak menuduh, saya tidak menuduh, saya berasakan dia (plaintif) telah mengambil rasuah daripada Dental, Kuala Lumpur International Dental Hospital'; and

(ii) 'To Chief Minister of Penang, please don't waste our time. We are busy untuk menepati janji. Dia busy untuk menipu. Dia memang tipu.'; and

(b) that the plaintiff shall withdraw or discontinue the civil action against Dato' Dr Shaikh Hussein Mydin in pursuance of the above retraction.

[8] The terms of the consent judgment were read out in open court by the plaintiff's counsel before the learned judicial commissioner.

[9] During the proceeding, numerous journalists and reporters from various media agencies were present in the court. One of them was a journalist under the employment of the defendant for the *Berita Harian* daily. After the proceeding, the plaintiff was approached by journalists and members of media. On their requests, the plaintiff handed them draft copies of the consent judgment.

[10] Then on 20 August 2015, the defendant printed and published in its *Berita Harian* newspaper in respect of the court proceeding that took place a day earlier, under the caption 'Guan Eng tarik balik saman terhadap bekas Ketua Pemuda UMNO Negeri'.

[11] The material and relevant excerpt of the news article reads:

> Ketua Menteri, Lim Guan Eng, semalam menarik balik samannya terhadap Ketua UMNO Bagan, Dato' Dr. Shaikh Hussein Mydin yang menuduhnya menerima rasuah daripada syarikat Kuala Lumpur International Dental Care (KLDIC) ketika membida Taman Manggis di sini.
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> ...
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> Guan Eng yang juga Setiausaha Agung DAP, selaku Plaintif bersetuju menarik balik saman tanpa sebarang syarat, dengan kedua-dua pihak bersetuju untuk menanggung kos masing-masing ('the impugned statements').

[12] The natural and ordinary meanings that could be discerned from the impugned statements in the news article are:

(a) that the plaintiff has discontinued a civil suit which he had instituted against Dato' Dr Shaikh Hussein Mydin who defamed and disparaged him in his office, position and profession; and

(b) that the discontinuance was made unconditionally on the first day of the trial.

[13] The impugned statements did not constitute a fair and accurate report of the judicial proceeding in the High Court.

[14] The plaintiff asserts that the impugned statements in the news article are defamatory of him.

[15] The publication of the impugned statements in the news article had disparaged the plaintiff in his personal as well as official capacity in terms of office, profession and calling. The impugned statements exposed him to humiliation, odium, ridicule, contempt and public scandal.

[16] The plaintiff's solicitor issued a notice of action dated 26 August 2015 demanding the defendant to publish in the *Berita Harian* newspaper an unconditional apology to him for the publication of an untruthful, distorted and misleading news article. The plaintiff also demanded the defendant to publish an erratum in the same newspaper to announce the error that was made in its report. However, the defendant failed to comply the demand.

THE DEFENDANT'S CASE

[17] The defendant is the printer and publisher of the *Berita Harian* newspaper.

[18] The article complained of by the plaintiff is entitled 'Guan Eng tarik balik saman Shaikh Hussein' which appeared at p 10 of *Berita Harian* on 20 August 2015 ('the news article').

[19] The news article reported that the plaintiff withdrew his summons against Dato' Dr Shaikh Hussein Mydin.

[20] The defendant denies that the news article was defamatory of the plaintiff and that it carries the connotations and/or imputations that:

(a) the plaintiff did not have the courage and willingness to pursue the cause of action against the said Dato' Dr Shaikh Hussein Mydin for defamation;

(b) the plaintiff is a vexatious litigant with tendency of instituting legal action without any basis, only to withdraw it at a later stage of the proceeding;

(c) the plaintiff conceded defeat to his opponent before the trial began;

(d) the plaintiff implicitly admitted that he has no case against his opponent;

(e) the defamatory statements made by the said Dato' Dr Shaikh Hussein Mydin, the essence of which is an allegation of bribery against the plaintiff in his capacity as the Chief Minister of Penang, are explicitly and implicitly conceded by the plaintiff as being true and justifiable;

(f) the plaintiff concedes that the said Dato' Dr Shaikh Hussein Mydin was justified in making those defamatory statements;

(g) the plaintiff lacks integrity and self-respect;

(h) the plaintiff is unworthy of reputation and lacks credibility;

(i) the plaintiff's character is bereft of integrity and honesty; and

(j) the plaintiff is undeserving of the position and office he is holding.

[21] The defendant relies on the defence of qualified privilege and the defence in s 12 of the Defamation Act 1957.

[22] In the alternative, the defendant relies on the defence of reportage.

[23] The news article was published based on an honest and reasonable belief of its truth without any malice. It was written and published in good faith with full compliance with the duties and obligations of responsible journalism. The matter reported in the news article is of legitimate public interest and is a fair reporting of the matter.

[24] The defendant offered to publish an erratum in *Berita Harian* but was rejected by the plaintiff and insisted that their wording be used.

[25] The defendant proceeded to publish an erratum in *Berita Harian* on 18 December 2015. Despite the publication of the erratum, the plaintiff nevertheless filed the action herein.

AGREED ISSUES TO BE TRIED

[26] The agreed issues to be tried are:

(a) whether the impugned statements in the news article published by the defendant in *Berita Harian* on 20 August 2015 are defamatory of the plaintiff?

(b) if the answer to the above is affirmative, whether the publication of the impugned statements give rise to connotations and/or imputations as enumerated in para 23 of the statement of claim?

(c) whether the defendant can rely on the defence of qualified privilege?

(d) whether the defendant can rely on the defence in s 12 of the Defamation Act 1957?

(e) whether the defendant can rely on the defence of reportage?

(f) whether the defendant can rely on the publication of the 'Ralat' in mitigation or extinction of damages? and

(g) whether the plaintiff is entitled to be awarded all the reliefs and orders as prayed.

DECISION OF THE COURT

The law on defamation

[27] It is trite law that to succeed in an action for defamation, the plaintiff must prove the followings:

(a) the impugned statements are defamatory to the plaintiff;

(b) the impugned statements refer to the plaintiff; and

(c) the impugned statements were published to third parties.

[28] His Lordship Mohamed Dzaiddin J, in the leading case of *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 at p 31 had laid down the elements to prove a claim for libel as follows:

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show: (1) the words are defamatory; (2) the words refer to plaintiff; and (3) the words were published. Where a defence of qualified privilege is set-up, as in the present case, the burden lies on the defendant to prove that he made the statement honestly and without any indirect or improper motive. Then if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as qualified privilege: *Rajagopal v Rajan* [1972] 1 MLJ 45.

WHETHER THE IMPUGNED STATEMENTS ARE DEFAMATORY TO THE PLAINTIFF

[29] The plaintiff alleged that the following statements to be defamatory to him, which is:

> Ketua Menteri, Urn Guan Eng, semalam menarik balik samannya terhadap Ketua UMNO Bagan, Dato' Dr Shaikh Hussein Mydin yang menuduhnya menerima rasuah daripada syarikat Kuala Lumpur International Dental Care ('KLDIC') ketika membida Taman Manggis di sini.
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> ...
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> Guan Eng yang juga Setiausaha Agung DAP, selaku Plaintif bersetuju menarik balik saman tanpa sebarang syarat, dengan kedua-dua pihak bersetuju untuk menanggung kos masing-masing ('impugned statements').

[30] The consent judgment that was recorded in the High Court of Penang Civil Suit No 22NCvC-853–12 of 2012 and spelled out in precision and clarity the following terms:

(a) that Dato' Dr Shaikh Hussein Mydin shall unconditionally and unreservedly retract the defamatory statements he made against the plaintiff in a press conference convened on 5 October 2012, where the statements read:

(i) 'Dan say a berasakan dan say a tidak menuduh, say a tidak menuduh, saya berasakan dia (Plaintif) telah mengambil rasuah daripada Dental, Kuala Lumpur International Dental Hospital'; and

(ii) 'To Chief Minister of Penang, please don't waste our time. We are busy untuk menepati janji. Dia busy untuk menipu. Dia memang tipu.'; and

(b) that the plaintiff shall withdraw or discontinue the civil action against Dato' Dr Shaikh Hussein Mydin in pursuance of the above retraction.

[31] In deciding whether the impugned statements were in fact defamatory to the plaintiff, I find it is pertinent to refer to the decision delivered by Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 at pp 374–375 where it was held that:

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory (see *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334). Richard Malanjum J, in an admirable judgment in *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, collected and reviewed the relevant authorities upon this branch of the subject and I would, with respect, expressly approve the approach adopted by him.
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> I also find it helpful to quote the decision by Low Hop Bing J (as he then was,) in the case of *Abu Samah bin Omar v Zainal bin Montel* [2004] 5 MLJ 377 at p 382 where it was held that:
>
> Whether the words are defamatory?
>
> In respect of this issue, it has been said that there is no precise test applied to determine whether or not any given words are defamatory or are capable of a defamatory imputation. Several general formulations have been accepted and may be stated as follows:
>
> (a) any imputation which may tend to lower the plaintiff in the estimation of right thinking members of society generally (see *SB Palmer v AS Rajah & Ors* [1949] 1 MLJ 6); to cut him off from society or to expose him to

hatred, contempt or ridicule (see *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142);

(b) a defamatory statement is one to a man's discredit, or which tends to lower him in the estimation of others, or to injure his reputation in his office, trade or profession, or to injure his financial credit or if the words cause him to be shunned or avoided: *Yussoupoff v Metro-Goldwyn-Mayer Pictures Ltd* [1934] 50 TLR 58; per Mohamed Azmi J (later FCJ) in *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56 at p 58, *Gatley on Libel and Slander* (6th Ed) at p 4, as followed by Ramly Ali J in Kian Lup Construction, at pp 41–42.

[32] It is thus incumbent to determine, in the present case, whether the impugned statements made against the plaintiff, in their natural and ordinary meaning, impute to his any dishonourable or discreditable conduct or motives or a lack of integrity on his part, tends to lower the plaintiff in the estimation of right thinking members of the society generally, to cut him off from society or to expose him to hatred, contempt or ridicule and to cause him to be shunned or avoided.

[33] It is also important to bear in mind that in determining whether the statement is capable of being defamatory, the words must be read in its context in which they were used — see *Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 394 at pp 403–404 (HC).

[34] The plaintiff pleaded that the impugned statements caused to be published by the defendant, if read in their ordinary and natural meaning to have the following imputation and/or connotations against the plaintiff, namely to mean that:

(a) the plaintiff did not have the courage and willingness to pursue the cause of action against the said Dato' Dr Shaikh Hussein Mydin for defamation;

(b) the plaintiff is a vexatious litigant with tendency of instituting legal action without any basis, only to withdraw it at a later stage of the proceeding;

(c) the plaintiff conceded defeat to his opponent before the trial began;

(d) the plaintiff implicitly admitted that he has no case against his opponent;

(e) the defamatory statements made by the said Dato' Dr Shaikh Hussein Mydin, the essence of which is an allegation of bribery against the plaintiff in his capacity as the Chief Minister of Penang, are explicitly and implicitly conceded by the plaintiff as being true and justifiable;

(f) the plaintiff concedes that the said Dato' Dr Shaikh Hussein Mydin was justified in making those defamatory statements;

(g) the plaintiff lacks integrity and self-respect;

(h) the plaintiff is unworthy of reputation and lacks credibility;

(i) the plaintiff's character is bereft of integrity and honesty; and

(j) the plaintiff is undeserving of the position and office he is holding.

[35] The defendant on the other hand, contended that the impugned statements is incapable of bearing the alleged imputation and/or connotations and hence is not defamatory of the plaintiff.

[36] In order to determine whether the impugned statements were defamatory, the entire factual context has to be considered.

[37] The sting of the defamation is contained in the words:

> Guan Eng yang juga Setiausaha Agung DAP, selaku Plaintif bersetuju menarik balik saman tanpa sebarang syarat, dengan kedua-dua pihak bersetuju untuk menanggung kos masing-masing.

[38] Whereas the consent judgment where its contents are the same as the draft consent judgment, inter alia, states:

> (i) that Dato' Dr Shaikh Hussein Mydin shall unconditionally and unreservedly retract the defamatory statements he made against the Plaintiff in a press conference convened on 5.1.2012 ...
>
> ...
>
> (ii) that the Plaintiff shall withdraw or discontinue the civil action against Dato' Dr Shaik Hussein Mydin in pursuance of the above retraction.

[39] The natural and ordinary meanings that could be discerned from the impugned statements in the news article are:

(a) that the plaintiff has discontinued a civil suit which he had instituted against Dato' Dr Shaikh Hussein who defamed and disparaged him in his office position and profession; and

(b) that the discontinuance was made unconditionally on the first day of the trial.

[40] Any reasonable minded person reading the news article would be aware of the nature of the suit taken by the plaintiff against Dato' Dr Shaikh Hussein Mydin. They would have understood that the civil suit culminated from the

accusation levelled by Dato' Dr Shaikh Hussein Mydin against the plaintiff. The allegation was serious that the plaintiff in his official capacity has accepted bribe from a corporate entity.

[41] This was worsened by the fact that the suit between the plaintiff and Dato' Dr Shaikh Hussein Mydin which the plaintiff had reportedly withdrawn unconditionally, was taken against the man who accused him of bribery.

[42] As such, the unconditional discontinuance of the action can be perceived as admission or deference to the accusation.

[43] From the above, I found that the impugned statements did not constitute a fair and accurate report the judicial proceeding even though a draft copy of consent judgment was given to DW1 ('Siti Sofia bt Md Nasir) who reported the news article.

[44] The impugned statements were untrue and deceptive, as facts have been distorted to the extent of reducing the article to false news.

[45] The reasonable minded person would comprehend the entire situation negatively by unconditionally discontinuing the civil suit, the plaintiff had admitted to the serious accusation of bribery.

[46] The impugned statements are capable of bearing the connotations and/or imputations against the plaintiff, which leave distinct impression on the mind of the reasonable reader, as pleaded by the plaintiff as follows:

(a) the plaintiff did not have the courage and willingness to pursue the cause of action against the said Dato' Dr Shaikh Hussein Mydin for defamation;

(b) the plaintiff is a vexatious litigant with tendency of instituting legal action without any basis, only to withdraw it at a later stage of the proceeding;

(c) the plaintiff conceded defeat to his opponent before the trial began;

(d) the plaintiff implicitly admitted that he has no case against his opponent;

(e) the defamatory statements made by the said Dato' Dr Shaikh Hussein Mydin, the essence of which is an allegation of bribery against the plaintiff in his capacity as the Chief Minister of Penang, are explicitly and implicitly conceded by the plaintiff as being true and justifiable;

(f) the plaintiff concedes that the said Dato' Dr Shaikh Hussein Mydin was justified in making those defamatory statements;

(g) the plaintiff lacks integrity and self-respect;

(h) the plaintiff is unworthy of reputation and lacks credibility;

(i) the plaintiff's character is bereft of integrity and honesty; and

(j) the plaintiff is undeserving of the position and office he is holding.

[47] Therefore, the impugned statements undoubtedly possess the tendency to excite against the plaintiff, the adverse opinion of others, tends to lower the plaintiff in the estimation of the right thinking members of the society.

[48] I am of the considered opinion that, by reading the news article as a whole and particularly the parts pleaded as the impugned statements, I found that the content of the said news article is defamatory to the plaintiff.

WHETHER THE IMPUGNED STATEMENTS REFER TO THE PLAINTIFF

[49] It is trite law that libel and slander action, the words and statements complained of must refer to the plaintiff. In the case of *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408, His Lordship Lim Beng Chuan J states that:

> It is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff'. The test which the plaintiff has to furnish an answer to satisfy the court is whether the words would reasonably in the circumstances lead persons acquainted with the plaintiff to believe that he was the person referred to.

[50] The plaintiff was identified by his name 'Lim Guan Eng' and 'Guan Eng' in the news article containing the impugned statements.

[51] There is no dispute that the content of the news article containing the impugned statements clearly stated the plaintiff's name.

[52] In my view, it patently refers to the plaintiff.

WHETHER THE IMPUGNED STATEMENTS WERE PUBLISHED TO THE THIRD PARTIES

[53] The Supreme Court, in the case of *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173; [1988] 1 CLJ Rep 233, held that:

> In order to constitute publication, the defamatory matter must be published to a third party, and not simply to the plaintiff. By publication is meant the making known of the defamatory matter; after it has been written, to some person other than the person of whom it is written.

[54] The defendant in his defence admitted the said news article containing the impugned statements was published in its *Berita Harian* daily.

[55] By such admission, I conclude that the said impugned statements were published to the third parties.

DEFENCE

[56] The defendant pleaded that the impugned statements do not bear a defamatory meaning.

[57] The defendant in its defence pleaded the defences of:

(a) qualified privilege;

(b) s 12 of the Defamation Acts 1957; and

(c) defence of reportage.

QUALIFIED PRIVILEGE

[58] In the appellate court case, *Zaina Salleh bin Abdul Rahman v The New Straits Time (M) Bhd* [2015] MLJU 738 states that:

> The defence of qualified privilege is recognized by courts on the grounds of public policy (see *Chew Peng Cheng v Anthony Teo Tiao Gin* [2008] 5 MLJ 577; [2008] 8 CLJ 418). In *Adam v Ward* [1917] AC 309, Lord Atkinson opined:
>
> > ... a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it This reciprocity is essential.
> >
> > For the defence of qualified privilege to succeed, the following two conditions must be satisfied: one there is a legal, moral or social duty to make the statement on one side, The other is that there is a corresponding interest to receive it. However; if it is spiked with malice, this defence wilt not be available, (see *Rajagopal v Rajan* [1972] 1 MLJ 45; [1971] 1 LNS 117).
> >
> > The common law defence of qualified privilege was further expanded by the House of Lords in the case of *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and followed in many more cases. As expanded, the principle now incorporates the concept of what is now called responsible journalism. The principle as

A extended recognises that newspapers are ordinarily expected to report contemporary events of public interest or of public concern. That is to say, in our context, reporting what the newsman sees or hears from the original source in relation to matters of public interest or concern. The truth per se is not material but the fact that such things were said in appropriate occasions by the maker may give the news media the right to publish the same. This has been laid down in various cases where the recognised defence in this area of law is now well established (see *Charman v Publishing Group Ltd* [2007] EWCA Civ 972; *Turkington and others v Times Newspapers Limited* (Northern Ireland) unreported, 2 November 2000; *Jameel v Wall Street Journal Europe* [2006] UKHL 44).

[59] His Lordship Prasad Sandosham J in the case of *Dato Annas bin Khatib Jaafar v Datuk Manja Ismail & Ors* [2011] 8 MLJ 747, summarises the modern version of qualified privilege in Malaysia anchoring the concept of constitutional guarantees as advocated in the case of *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 as follows:

> The defence of qualified privilege through the concept of responsible journalism gives a certain degree of latitude surrounding newspaper publications not available previously. It is a question of the rights of the plaintiff to the protection of his own reputation as opposed to the freedom of expression and the role of the media in modern society. So long as the defendant advanced matters of public interest within the confines of responsible journalism, they were always be in a position to enjoin the court to declare the reassertion of the guarantee to the freedom of speech enshrined under art 10 of the Federal Constitution. This approach would be consonant with the aspirations of modern society for transparency and accountability whilst protecting against blatant maligning of the reputation of individuals.
>
> What then is responsible journalism? The court to conclude that news publisher had advocated responsible journalism must at least consider and/or take into account where applicable, the ten criteria asserted in *Reynold*'s case which can be summarised as follows:
>
> (i) the seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true;
>
> (ii) the nature of the information, and the extent to which the subject-matter is a matter of public concern;
>
> (iii) the source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories;
>
> (iv) the steps taken to verify the information;
>
> (v) the status of the information. The allegation may have already been the subject of an investigation which commands respect;
>
> (vi) the urgency of the matter. News is often a perishable commodity;

(vii) whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary;

(viii) whether the article contained the gist of the plaintiff s side of the story;

(ix) the tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact;

(x) the circumstances of the publication, including the timing.

[60] It is the defendant's case, the publication of the said news article containing the impugned statements are regarding matters of public interest, published based on honest and reasonable belief of its truth without malice and the defendant has a moral duty to write and publish the news article. Further the defendant contended that the news article containing the impugned statements was published in good faith with full compliance with the duties and obligations of responsible journalism and it is a fair reporting of the matter concerned.

[61] It is not denied that defendant, the *Berita Harian* publisher, have a social moral and legal duty to publish report of judicial proceedings for knowledge of the public but the performance of the duty must be for the dissemination of fair, accurate and contemporaneous account of proceedings.

[62] The threshold requirement of a newspaper publisher must satisfy in order to seek protection for the defence of qualified privilege is that the report of a judicial proceeding that was published must be fair and accurate, apart from being contemporaneous — see *Joceline Tan Poh Choo & Ors v V Muthusamy* [2003] 4 MLJ 494; [2003] 5 AMR 195.

[63] In this present case, it is established beyond doubt that the news article containing the impugned statements is not a fair and accurate report of events that took place in open court on 19 August 2015.

[64] The defendant did not dispute that the news article which contains the impugned statements is misleading and deceptive on account of its failure to print and publish the exact terms of the consent judgment.

[65] As such, the defendant has failed to satisfy the threshold requirement dictated by the principle governing the defence of qualified privilege on newspaper report on judicial proceeding.

WHETHER THE DEFENDANT CAN RELY ON THE DEFENCE IN S 12 OF THE DEFAMATION ACT 1957

[66] The defendant also pleaded the statutory defence of qualified privilege under s 12 of the Defamation Act 1957.

[67] Section 12(1) and (2) of the Defamation Act 1957 states that publication in a newspaper of any report or other matter mentioned in Part I and Part II of the Schedule of the said Act shall be privileged. The defence is related to publication of the protected report or matter on newspapers.

[68] Part 1 of the Schedule refers to, inter alia, a fair and accurate report of proceedings before any court exercising jurisdiction throughout any part of the Commonwealth outside Malaysia.

[69] Thus, this court finds that s 12(1) and (2) of the Defamation Act 1957 is not applicable in this case because the publication complained of does not fall into any of the categories mentioned in Part I and Part II of the Schedule to the Defamation Act 1957. Part I and Part II of the Schedule to the Defamation Act 1957 does not encompass court proceedings in Malaysia.

[70] Further, there was no evidence adduced to show that the publication is in relation to report and matter fallen into any of the categories referred to in Part I and Part II of the said Schedule — see *DP Vijandran v Karpal Singh & Ors* [2000] 3 MLJ 22 at p 49.

[71] Hence, the defendant cannot rely on the defence of qualified privilege of newspaper as provided by s 12 of the Defamation Act 1957.

DEFENCE OF REPORTAGE

[72] In the alternative, the defendant pleads the defence of reportage. Both sides did not submit on this issue, so I conclude that the defendant did not proceed with this defence. For completeness, I will deal with this issue.

[73] As for defence of reportage, which has been pleaded, the defendant ought to provide the public timely information on matters of public interest. This court is of the considered view that there ought to be a balancing exercise by the defendant, the need to provide information to the public on matters of public interest which must be the truth as against the need to avoid damaging the reputation of an individual which cannot be compromised — see *Datuk Seri Anwar bin Ibrahim v Utusan Melayu (M) Bhd & Anor* [2013] 3 MLJ 534.

[74] It was proven that the news article which contains the impugned statements is misleading; it does not represent a fair and accurate account of the judicial proceeding. It was false news. Hence the defence of reportage will be of no avail to the defence.

WHETHER THE DEFENDANT HAD PRACTISED RESPONSIBLE JOURNALISM ACCORDING TO THE *REYNOLDS* PRIVILEGE?

[75] The test to be applied is whether the defendant had practised responsible journalism according to the *Reynolds* privilege in order to avail themselves of the defence of qualified privilege. The defence can be rebutted by evidence of the element of malice on the part of the defendant — see *Adam v Ward* [1917] AC 309.

[76] Lord Hoffman in *Jameel and another v Wall Street Journal Europe SPRL* [2006] 4 All ER 1279; [2006] UKHL 44 referred to *Bonnick v Morris and others* [2002] UKPC 31 at p 41 states that:

> Stated shortly, the *Reynolds* Privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputation of individuals.
>
> Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved.
>
> Lord Nicholls was speaking in the context of a publication in newspaper but the defence is of course available to anyone who publishes material of public interest in any medium. The question in each case is whether the defendant behaved fairly and responsibly in gathering and publishing the information.

[77] The question now is whether the defendant has published the impugned statements fairly and responsibly by ensuring the accuracy of the news article.

[78] DW1 was called to testify for the defendant. DW1 conceded to the fact that the journalist whom it has been assigned to cover the event had indeed received a draft of the consent judgment. DW1 also admitted that she read and fully understood the contents of the draft consent judgment and she also agreed that the terms of settlement between both sides were embodied in the draft consent judgment.

[79] The court compares the defendant news article which contains the impugned statements, that was published by the defendant and the consent judgment (the plaintiff testified that the contents of the draft consent judgment and the consent judgment are the same) and found that the

impugned statements did not constitute a fair and accurate report of the consent judgment that was agreed between the plaintiff and Dato' Dr Shaikh Hussein Mydin.

[80] The impugned statements were untrue and deceptive, as facts have been distorted to the extent of reducing the article to false news.

[81] Therefore, the defendant publication is clearly false and defamatory to the plaintiff. In such a situation, malice on the part of the defendant can be inferred.

WHETHER THE DEFENDANT CAN RELY ON THE PUBLICATION OF THE *RALAT* ('ERRATUM') IN MITIGATION OF DAMAGES?

[82] The defendant submitted that the published erratum was sincere, reasonable and not stale. The defendant offered to publish an erratum shortly after receiving the plaintiff's notice of action but there were several exchanges of correspondence on the wording of the erratum. The plaintiff rejected the offer; the defendant went on to publish the erratum. The defendant submitted, if the court agrees with the plaintiff on the issue of liability, the plaintiff should only be awarded nominal damages.

[83] The plaintiff submitted that the erratum published by the defendant on 18 December 2015 is inconsequential and does not serve the intended purpose as it was only published four months after the publication of the impugned statements.

[84] It is not an expression of remorse for the disrepute the defendant brought upon the plaintiff.

[85] The plaintiff submitted that the erratum is incapable of mitigating the damages.

[86] What is meant by 'erratum'?

[87] *Webster's New Dictionary & Thesaurus* defines that the word erratum as mistake noted for correction. For the purpose of this case, it means that a correction of a published text ie the news article which contains the impugned statements.

[88] An erratum is most commonly issued shortly after its original text is published.

[89] The defendant contends that the defendant has responded with an offer of an erratum three weeks after receiving the plaintiff's notice of action. The four months delay was caused by the plaintiff's unreasonable, irritable and dictating the wording of the erratum.

[90] Having closely scrutinised the published erratum, I find that the erratum published was not the correction of the published text.

[91] The erratum published was wholly unsatisfactory and inadequate in all circumstances of the matter. The defendant should have known that such news article which contains the impugned statements published in a nationally read newspaper would have serious implication on the plaintiff.

[92] Hence, the publication of the erratum by the defendant is incapable of mitigating the damages.

[93] In this case, I find that the plaintiff has succeeded in proving on a balance of probabilities that he was defamed by the defendant.

[94] I shall now assess the damages that should be awarded to the plaintiff.

DAMAGES

[95] It is trite law that once libel is proven, there is no requirement for the plaintiff to prove resulting damage for such damage is presumed.

[96] In the statement of claim, the plaintiff prayed for an injunctive relief, general damages which includes aggravated damages and exemplary damages.

[97] The normal factors the court would consider in assessing damages would be the nature of the defamation, the position and standing of the plaintiff, the gravity and seriousness of the libel and the extent of the circulation of the defamatory statements.

[98] It cannot be disputed that the plaintiff has high social standing where he holds an important public office as the Chief Minister of the State of Penang. The plaintiff's conducts and actions naturally come under the public scrutiny.

[99] The libellous allegation is serious as he was allegedly abusing his office by accepting bribes. The libel was of grave and serious nature.

[100] It also has tendency to damage the reputation of the plaintiff as the Chief Minister.

[101] In respect of the extent of the circulation, *Berita Harian* daily has wide circulation in Peninsular Malaysia. The publication was extensive.

[102] An award for aggravated damages can be included in the general award of compensatory damages.

[103] Having considered all the circumstances of the case, I shall award the plaintiff the sum of RM300,000 as general and aggravated damages with 5% interest from today until realisation.

[104] The claim for exemplary damages must be dismissed as it did not come within the principles set out in the case of *Rookes v Barnard & Ors* [1964] AC 1129.

[105] However, I find that, it is unnecessary to grant an injunction against the defendant to publish an apology in *Berita Harian* daily where I find that the award for damages is a reasonable award to be awarded to the plaintiff. Therefore, the prayer for an injunction and apology are not allowed as general damages will suffice.

[106] In respect of costs, the counsel for the plaintiff suggested RM50,000 where as counsel for defendant suggested that both parties should bear their own costs.

[107] In my view, given the fact that it was a full trial at the High Court, the costs of RM35,000 is reasonable. I shall therefore order the defendant to pay costs of RM35,000 to the plaintiff.

Plaintiff's action allowed with costs of RM35,000.

Reported by Dzulqarnain Ab Fatar